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FOR ARGUMENT No. 87-1245

In The
Supreme Court of the United States
October Term, 1987

TEXAS MONTHLY, INC.,

Appellant,

vs.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas, JIM MATTOX, Attorney General of the State of Texas, and ANN RICHARDS, Treasurer of the State of Texas,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

REPLY BRIEF

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REPLY BRIEF

The issue of standing raised by appellees in their brief was fully addressed by this Court in *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722, 1726 (1987). There, the publisher of a non-exempt magazine challenged the constitutionality of a statute exempting from a general sales tax only "religious, professional, trade and sports journals." The Arkansas Commissioner of Revenue argued that the non-exempt publisher lacked standing because, even if the exemption were held unconstitutional, the appropriate remedy, as held by the Arkansas Supreme

Court, would be to strike the exemption and not the tax. Since a favorable decision of the Court would not relieve the publisher of its tax burden, the requirements for standing set forth in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), would not be met.

The Court rejected the standing argument:

> We do not accept the Commissioner's notion of standing, for it would effectively insulate underinclusive statutes from constitutional challenge, a proposition we soundly rejected in *Orr v. Orr*, 440 U.S. 268, 272, 99 S.Ct. 1102, 1108, 59 L.Ed.2d 306 (1979).

107 S.Ct. at 1726. Holding that the non-exempt publisher had standing to challenge the statute, the Court considered the merits, held the exemption unconstitutional and invalidated the tax. *Id.* at 1730.[1] *Arkansas Writers' Project* is consistent with other cases in which the Court has held that underinclusive statutes placed an unconstitutional burden on free speech. The Court has relieved speech from the impermissible burden rather than extend the burden to a broader category of speech. *See, e.g., Carey v. Brown*, 447 U.S. 455 (1980) (statute prohibiting all picketing except peaceful labor picketing unconstitutional; entire statute invalid); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) (statute prohibiting picketing in front of schools unless related to labor dispute unconstitutional;

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[1]The Court held the tax invalid even though the Arkansas Supreme Court had stated that under state law the proper remedy would be to strike the exemption and not the tax. *Ragland v. Arkansas Writers' Project, Inc.*, 287 Ark. 155, 698 S.W.2d 802, 803 (1985).

entire statute invalid). *See also Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) (exemption from tax for in-state manufacturers held unconstitutional; tax on out-of-state manufacturers invalid).

The Texas statute, like the one in *Arkansas Writers' Project*, is an underinclusive one, exempting from a general sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith." Texas Monthly has asserted a personal stake in the outcome of this litigation. It has remitted to the State substantial sales tax imposed because of the content of its periodical which can be recovered only by challenging the underinclusive exemption. The instant case is indistinguishable from *Arkansas Writers' Project*.

Appellees assert that there is a basis for distinguishing *Arkansas Writers' Project*. Subscription sales of periodicals became exempt from the Texas sales tax effective October 1, 1987 while the Arkansas tax was still in effect during the appeal. This fact does not affect standing for two reasons. First, Texas Monthly has been required to remit substantial sums in taxes to the State because of the *content* of its magazine. The penalty on speech remains a harsh one regardless of whether subscription sales continue to be taxed. Second, Texas Monthly's newsstand sales continue to be taxed while similar sales of religious periodicals are exempt. The competitive harm of the content-based unequal treatment of magazines still exists.[2]

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[2]Further, contrary to appellees' argument, state law mandates a refund of taxes paid by Texas Monthly rather than an extension

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CONCLUSION

For the reasons stated here and in the Brief for Appellant, the judgment of the Texas Court of Appeals should be reversed and the judgment of the district court affirmed.

Respectfully submitted,

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of the tax to religious periodicals. The district court so held, awarding Texas Monthly all taxes it had paid under protest. J.S. App. 43. The Court of Appeals did not reach the issue. *See Pullman P.C. Co. v. State*, 64 Tex. 274 (1885) (striking tax, not exemption; courts cannot amend legislation to extend tax to group legislature intended to exempt); *Hurt v. Cooper*, 113 S.W. 2d 929, 941 (Tex. Civ. App.—Dallas 1938, no writ) (court may not impose tax on exempted subjects but may relieve taxpayers upon whom burden imposed; saving provision or severability clause does not change this result).